Supreme Court, U.S.
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CLERK

(2)

CASE NO. 85-1020

in the Supreme Court of the United States

October Term, 1985

DANIEL GONZALES GELLERT,
Petitioner,

vs.

EASTERN AIR LINES, INC.,
Respondent

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries and affiliates of Eastern Air Lines, Inc. are:

Eastern Air Lines, S.A.
Eastern Air Lines Trading Company
EAL Properties, Inc.
Air Line Reporting Corporation
Aeronautical Radio, Inc.
Air Cargo, Inc.
Air Cargo Facilities, Inc.
Air Lines Clearing House, Inc.
Air Line Tariff Publishers, Inc.
Arizona Fuel Facilities
Atlanta Air Terminal, Inc.
Bradley Facilities, Inc.
CATO Detroit, Michigan
CATO Evanston, Illinois
CATO Washington, D.C.
CATO White Plains, New York
Inter-American Flight Services Company
International Aeradio (Caribbean), Ltd.
Manhattan Air Terminal, Inc.
Portland Fuel Facilities
Societe Int'l de Telcom.
Tinicum Fuel Facilities Corp.

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Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed.2d 527, (1983)	5
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	2
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STATEMENT OF THE CASE

Daniel G. Gellert sued his employer, Eastern Air Lines, Inc., for defamation. The suit was based on statements allegedly made by Jim Ashlock, director of Eastern's news bureau, during a telephone interview in November of 1978, with David Blundy, a reporter for the London Sunday Times. Ashlock was asked to comment about an ongoing dispute between Eastern and Gellert. In an article published in the Times on November 19, 1978, Ashlock is quoted as saying:

> Gellert has been complaining for years. I think you ought to know that he wrote some odd letters to the FBI (Federal Bureau of Investigation). He said Eastern was out to get him, that we tried to crash a plane in order to kill him, that we deliberately altered the altitude instruments on a plane he was flying. He's paranoid.

According to the article, Blundy questioned why Gellert was permitted to fly Eastern's passenger jets, to which Ashlock reportedly replied:

> Its awfully hard to fire anyone these days. . . Anyway, we have three of them in the cockpit. Know what I mean?

Gellert's suit was tried before a jury for the first time in November of 1980, and the jury returned a verdict in Gellert's favor. The final judgment entered in Gellert's favor was reversed on appeal to the District Court of Appeal of Florida, Third District. The reversal was based on an abuse of the trial court's discretion in

regulating Eastern's use of peremptory challenges during jury selection. *See Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983).

On remand, the case was tried for a second time, and the jury returned a verdict for Eastern. A final judgment was entered in Eastern's favor. On appeal, the District Court of Appeal affirmed. The entire text of the court's decision was:

> PER CURIAM.
> Affirmed. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); *Sears Roebuck & Company v. Jackson*, 433 So.2d 1319 (Fla. 3d DCA 1983)

Gellert v. Eastern Air Lines, Inc., 466 So.2d 9 (Fla. 3d DCA 1985), Appendix p. 1.

Gellert then sought review in the Supreme Court of Florida, which has no jurisdiction to review per curiam affirmances of the district courts of appeal. Fla. Const.. art. V, § 3(b)(3); *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). Gellert's Petition for Review was dismissed by the Florida Supreme Court, based on lack of jurisdiction.

ARGUMENT

I.

THE COURT LACKS JURISDICTION TO CONSIDER THIS MATTER BECAUSE NO FEDERAL QUESTION HAS BEEN RAISED IN THIS COURT OR IN THE COURT BELOW.

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. §1257, which provides in pertinent part that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari . . . where any title right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

In his Petition for Writ of Certiorari, Gellert has failed to set forth any "title, right, privilege or immunity" which he is claiming "under the Constitution, treaties or statutes of . . . the United States." Although Gellert discusses various defenses raised below by the Respondent, Gellert does not personally claim any "title, right, privilege or immunity . . . under the Constitution, treaties or statutes of the United States." Based on the fact that no federal question has been presented, the Petition should be dismissed for lack of jurisdiction.

In addition, there was no federal question presented by Gellert to the District Court of Appeal of Florida, Third District, and that court did not pass on any federal question. The issues presented to the appellate court were summarized in Eastern's brief as follows:

> Appellant has raised the following matters in his original brief: (1) the exclusion of evidence during trial by the trial judge; (2) allegations that defense counsel called Gellert a criminal while the trial was in recess and the jury was not present; (3) a statement by defense counsel during closing argument about the result of prior trials to which no objection was made at trial; and (4) the jury's failure to award punitive damages.

See, Answer Brief of Appellee, Eastern Air Lines, Inc., App. 10-11.

It is also apparent that the appellate court did not pass on any federal question. The court's decision is a per curiam affirmance with two case citations, *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979) and *Sears Roebuck & Company v. Jackson*, 433 So.2d 1319 (Fla. 3d DCA 1983). In its Answer Brief below, Eastern argued that it was impossible to respond to Gellert's argument that the trial court erred in excluding evidence during the trial because Gellert did not provide a complete trial transcript. Gellert only furnished a transcript of the testimony of two Eastern employees and the closing argument of Eastern's trial counsel. The transcript did not reflect any of the trial court's evidentiary rulings. *Applegate, supra*, was cited

by Eastern for the proposition that where a party fails to supply the appellate court with an adequate record, an affirmance is mandated.

In its Answer Brief below, Eastern also contended that Gellert's argument in regard to the alleged impropriety of a statement made by Eastern's attorney during closing argument should be rejected because no objection to the statement was made. Eastern cited *Sears Roebuck & Company v. Jackson, supra*, for the proposition that comments during closing argument about prior litigation between the parties did not constitute fundamental error, and therefore the error could not be considered on appeal in the absence of an objection at trial.

It is apparent that no federal question was raised below by Gellert and no federal question was passed on by the appellate court. The Petition should, therefore, be dismissed for lack of jurisdiction. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 76 L. Ed.2d 527, (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE DOES NOT INVOLVE ANY FEDERAL QUESTION AND THE DECISION OF THE STATE COURT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OR A FEDERAL COURT OF APPEALS.

Rule 17 of the Rules of the Supreme Court of the United States sets forth considerations governing review on certiorari. None of the considerations listed are present in this case. As argued under Point I, Petitioner has failed to raise any federal question in this Court or in the court below. Petitioner has also failed to demonstrate that the decision of the District Court of Appeal of Florida, Third District, conflicts with a decision of any other state court or of any federal court. There are, therefore, no factors present which would justify granting review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10 day of January, 1986 to: Daniel Gonzales Gellert, P.O. Box 370, Cocoa Beach, FL 32931.

By: Kathleen M. O'Connor
KATHLEEN M. O'CONNOR

Appendix

Daniel G. GELLERT,

Appellant,

v.

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellee.

District Court of Appeal of Florida,
Third District.

March 12, 1985.

Rehearing Denied April 19, 1985.

Appeal from Circuit Court, Dade County; Margarita Esquiroz, Judge.

Daniel Gonzales Gellert, in pro. per.

Thornton, David & Murray and Kathleen M. O'Connor, Miami, for appellee.

Before SCHWARTZ, C.J., and DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

AFFIRMED

Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); *Sears Roebuck & Company v. Jackson* 433 So.2d 1319 (Fla. 3d DCA 1983).

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA THIRD DISTRICT

CASE NO. 84-1581

DANIEL G. GELLERT,

Appellant,

vs.

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellee.

APPEAL FROM THE CIRCUIT COURT, DADE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE, EASTERN AIR LINES, INC.

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INTRODUCTION

This case involves a pro se appeal by Daniel G. Gellert ("Gellert") from an adverse final judgment in a defamation action against Eastern Air Lines, Inc. ("Eastern").[1] This matter was tried before a jury for approximately one week, however, Gellert has designated only a small portion of the trial testimony for inclusion in the record on appeal. The trial transcript contains the testimony of two witnesses, elicited during Gellert's case in chief, and defendant's closing argument. The lack of an adequate record makes it difficult to present a thorough statement of the case and facts. In addition, in some instances it is impossible to respond substantively to argument raised by appellant where the record does not reflect the proceedings discussed in appellant's argument.

Eastern would like to point out that it has not waited quietely until the filing of the Answer Brief to call attention to the fact that the appellant has a duty to provide an adequate record. Eastern previously filed a Motion to Compel Compliance with Appellate Rules, based on the fact that Gellert had not filed a Designation to the Court Reporter. Eastern also filed a Motion to Strike appellant's Motion for Relief, etc. (The Court has elected to treat Gellert's Motion for Relief, etc. as an initial brief). In a seven page Motion to Strike and Memorandum of Law, Eastern pointed out that Gellert's Motion for Relief had been filed prior to the preparation of a trial transcript and that the transcript, when filed,

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[1]Mr. Gellert was represented by counsel throughout the proceeding below.

would not support the vast majority of the allegations and arguments raised in the brief. The Motion to Strike was denied.

Once the inadequacy of the record was pointed out, however, Gellert had an opportunity to supplement the record with an adequate transcript, if he desired to do so. In this Answer Brief, Eastern has addressed all issues raised by Gellert and has offered substantive argument where possible.

STATEMENT OF THE CASE AND FACTS

Daniel G. Gellert sued his employer, Eastern Air Lines, Inc. for defamation. [R. 1-5][1] The suit was based on statements allegedly made by Jim Ashlock, director of Eastern's news bureau, during a telephone interview in November of 1978, with David Blundy, a reporter for the London Sunday Times. [R. 1-5]. Ashlock was asked to comment about an ongoing dispute between Eastern and Gellert. In an article published in the Times on November 19, 1978, Ashlock is quoted as saying:

> Gellert has been complaining for years. I think you ought to know that he wrote some odd letters to the FBI (Federal Bureau of Investigation). He said Eastern was out to get him, that we tried to crash a plane in order to kill him, that we deliberately altered the altitude instruments on a plane he was flying. He's paranoid.

---

[1]In this brief the Record on Appeal will be referred to by the symbol "R" and the trial transcript will be referred to by the symbol "T."

According to the article, Blundy questioned why Gellert was permitted to fly Eastern's passenger jets, to which Ashlock reportedly replied:

> It's awfully hard to fire anyone these days. Anyway, we have three of them in the cockpit. Know what I mean?

[R. 5].

Gellert's suit was tried before a jury for the first time in November of 1980, and the jury returned a verdict in Gellert's favor. [R. 437]. The final judgment entered in Gellert's favor was reversed on appeal to this court based on an abuse of the trial court's discretion in regulating Eastern's use of peremptory challenges during jury selection. *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983).

On remand, the case was tried for a second time, and the jury returned a verdict for Eastern. A final judgment was entered in favor of Eastern, and this appeal followed. [R. 854].

SUMMARY OF ARGUMENT

Appellant, Gellert, has argued that the trial court improperly excluded evidence during the trial of this case. However, based on appellant's failure to provide a trial transcript showing what evidence was offered and what rulings were made by the court, the evidentiary rulings must be upheld.

Gellert has argued that defense counsel called him a criminal during the trial. This cannot be the basis for error where the trial transcript clearly shows that this never occurred and where the conversation in which the statement allegedly was made took place while the jury was not present.

Appellant argues that defense counsel made improper remarks in closing argument, however, this point was not preserved for review where no objection was made at trial.

Appellant has also discussed the issue of punitive damages, however, there can be no error in the failure to award punitive damages where there was no award of compensatory damages.

ISSUE ON APPEAL

WHETHER TRIAL COURT ERRED IN ENTERING A FINAL JUDGMENT IN FAVOR OF DEFENDANT, EASTERN AIR LINES.

ARGUMENT

THE TRIAL COURT CORRECTLY ENTERED A FINAL JUDGMENT IN FAVOR OF DEFENDANT, EASTERN AIR LINES.

Appellant has raised the following matters in his original brief: (1) the exclusion of evidence during trial by the trial judge; (2) allegations that defense counsel called Gellert a criminal while the trial was in recess and the jury was not present; (3) a statement by defense

counsel during closing argument about the result of prior trials to which no objection was made at trial; and (4) the jury's failure to award punitive damages. Each point will be discussed in this Answer Brief.

1. **Exclusion of evidence**

Appellant, Gellert, has argued that the trial judge unfairly excluded some of the evidence he desired to present at trial. However, the trial transcript does not reflect any of the trial court's evidentiary rulings. Gellert has provided a transcript of the testimony of two of defendant's employees and the closing argument of Eastern's trial counsel. Undersigned counsel finds it impossible to respond to this issue without knowing what evidence Gellert wished to present, and whether the evidence was ever offered at trial by Gellert's attorney. If the evidence was offered at trial, it is impossible to tell exactly what evidence was offered. It is also impossible to guess whether the evidence was relevant; whether the evidence, if relevant, was cumulative; or whether the evidence was offered in the proper form. It is also impossible to tell what the trial judge ruled and whether some evidence was totally excluded or simply limited. Similarly, it is unknown whether the trial judge excluded testimony of witnesses or documentary evidence, or both. Because undersigned counsel has no idea what items of evidence were excluded by the trial court, it is just not possible to address the merits of this issue.

It is axiomatic that rulings made by the trial court are presumed to be correct, and it is the burden of the appellant to clearly demonstrate error. *Applegate v.*

Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); *Ruppenthal v. Wood*, 425 So.2d 194 (Fla. 3d DCA 1983). Admission of evidence is a matter within the sound discretion of the trial judge, whose decisions in that regard must be reviewed in the context of the entire trial. *Jiminez v. Gulf & Western Manufacturing Co.*, 9 FLW 2257 (Fla. 3d. DCA Oct. 9, 1984); *Division of Corrections v. Wynn*, 438 So.2d 446, 448 (Fla. 1st DCA 1983). It has specifically been recognized that the admission of "background evidence" is generally a matter left to the discretion of the trial court. *Goode v. State*, 50 Fla. 45, 39 So. 461 (Fla. 1905); *Huffman v. Peek*, 102 So.2d 641 (Fla. 2d DCA 1958); 3 *Fla. Jur.* 2d, *Appellate Review* §336, fn. 58. The trial court's decisions in regard to the admission or exclusion of evidence will not be disturbed in the absence of a clear showing of abuse of discretion. *Buchman v. Seaboard Coast Line R. Co.*, 381 So.2d 229 (Fla. 1980); *Lasar Mfg. Co., Inc. v. Bachanov*, 436 , So.2d 236 (Fla. 3d DCA 1983); *Huff v. Belcastro*, 127 So.2d 476 (Fla. 3d DCA 1961).

In order to carry the burden of clearly demonstrating reversible error, appellant is required to bring to the court a trial record which contains all proceedings that must be considered in order to determine whether prejudicial error occurred. *Ben-Hain v. Tacher*, 418 So.2d 1107 (Fla. 3d DCA 1982); *Harmony Homes, Inc. v. Sevened, Knight, Boerema, Buff*, 355 So.2d 490 (Fla. 3d DCA 1978); *Greene v. Hoiriis*, 103 So.2d 226 (Fla. 3d DCA 1958). Where, as here, appellant fails to provide an adequate record, an affirmance is mandated. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); *Moye v. Bayou Grande Villa Association*, 10 FLW 47 (Fla. 1st DCA Dec. 20, 1984); *Peters Machinery Corp. v. Blairville Mach. Products Co.*, 413 So.2d 802 (Fla. 3d

DCA 1982). Therefore, rulings made by the trial court in regard to the admissibility of evidence should be affirmed.

2. **Alleged Statements made during a Trial Recess.**

According to Gellert, defense counsel called him a criminal during a trial recess. The portion of the trial transcript furnished by Appellant reveals that this simply did not occur. (T. 41-45). The transcript shows that during a recess, Gellert's attorney stipulated to the withdrawal of one of Plaintiff's trial exhibits. Defense counsel asked for a copy of the exhibit for possible further proceedings:

> MR. DAVID [defense counsel]: . . . [T]here's another proceeding after this trial relative to that letter and your Honor may have to make some rulings.
>
> THE COURT: What proceedings are your taking about?
>
> MR. DAVID: I'm taking about creating a complex situation and physically slipping it in on us without having seen it. It concerns sabotage.
>
> It's never been received, never been received, never been identified in 13 years of litigation. [T. 42-43]

After Plaintiff's attorney stipulated to the withdrawal of the exhibit in question, the jury returned to the courtroom. [T. 45].

Even if defense counsel had called Gellert a criminal, Gellert could not have been prejudiced because the jury was not present. It is firmly established that a judgment will not be reversed because of errors that do not prejudice substantial rights of the appellant or affect the result of the action. *See* Section 59.041, Florida Statutes (1983).

3. Remarks of Defense Counsel During Closing Argument.

Appellant, Gellert, has argued that a reversible error occurred when Eastern's defense counsel made the following remarks during closing argument:

> Mr. Gellert has brought five lawsuits, 30 or 30 grievances, so don't you be the first jury to award him in one.

[T. 109]. It is correct that Gellert has never made a recovery against Eastern Air Lines in any of his prior lawsuits. However, in one prior case, after a jury verdict for Gellert, the trial court granted a renewed motion for directed verdict and entered judgment in favor of Eastern, which was affirmed on appeal. *Gellert v. Eastern Air Lines, Inc.*, 370 So.2d 802 (Fla. 3d DCA 1979), *cert. denied* 381 So.2d 766 (Fla. 1980). In the case at bar, a judgment in favor of Gellert entered after the first trial was reversed, and the case was remanded for a new trial. *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983). Therefore, while it is true that Gellert received two jury awards, neither award in favor of Gellert was upheld.

As a general rule, if error is to be predicated on an improper argument of counsel, an objection must be made at the time the argument is presented. *Tillman v. State*, 44 So.2d 644, 649 (Fla. 1950); *Bishop v. Watson*, 367 So.2d 1073, 1076-1077 (Fla. 3d DCA 1979); *H.I. Holding Company v. Dade County*, 129 So.2d 693, 695 (Fla. 3d DCA 1961) *cert. denied* 133 So.2d 646 (Fla. 1961). The Florida Supreme Court has recognized that if counsel does not see fit to object to allegedly improper argument, an appellate court is justified in concluding that the argument was not highly prejudicial. *Rogers v. State*, 158 Fla. 582, 30 So.2d 625 (Fla. 1947). Where an appropriate objection is made, the impropriety of the argument may often be cured by sustaining the objection, by an admonition to counsel, by a retraction of counsel's remarks or by a proper instruction to the jury to disregard the statements. In the case at bar, a retraction of the statement in question could certainly have cured any impropriety, as could an instruction to the jury to disregard the statement.

The only exception to the well-recognized rule that a party must object to improper argument of counsel in order to preserve the matter for appellate review is where there is fundamental error. Some improper remarks are considered so inflammatory that neither rebuke by the trial court nor retraction by counsel, can cure their effect. However, the remarks at issue here were certainly subject to retraction and an appropriate instruction by the court.

To the extent that the remarks constituted a comment on the prior disposition of litigation between the parties, this Court has held that remarks of that nature do not constitute fundamental error. *Sears Roebuck*

& Company v. Jackson, 433 So.2d 1319 (Fla. 3d DCA 1983). In that case, the trial court granted a new trial to plaintiffs on the ground that defense counsel made two improper remarks during trial. In both instances, defense counsel commented on the fact that plaintiffs had previously taken a voluntary dismissal of their case. In reversing the granting of a new trial this court stated:

> While we agree with the trial court that commenting on the plaintiffs having taken a voluntary dismissal was irrelevant to the issues in the case, we do not agree that such remarks were "of such character that neither rebuke nor retraction may entirely destroy their sinister influence. . . . *Baggett v. Davis*, 124 Fla. 701, 169 So. 372, 379 (1936) (quoting *Akin v. State*, 86 Fla. 564, 573, 98 So. 609, 612 (1923)), or, otherwise stated, so inflammatory as to extinguish the plaintiffs' right to a fair trial and to therefore constitute fundamental error. That, being so, these remarks cannot be the basis for a new trial, absent, at least, a timely objection to the first remark, *Bishop v. Watson*, 367 So.2d 1073 (Fla. 3d DCA 1979), and a timely motion for mistrial directed to the second remark. . . . [Extensive citations omitted].

433 So.2d at 1321.

In his brief Gellert has argued that a jury instruction should have been given in regard to the remarks of defense counsel. However, in the absence of any objection or motion for mistrial or request for an instruction by Gellert's trial attorney, the remarks of defense counsel cannot form the basis for finding error.

(4) Failure of the Jury to Award Punitive Damages.

Gellert has discussed the issue of punitive damages in his brief. However, it is well established that a plaintiff who is not awarded compensatory damages may not recover punitive damages. *McLain v. Pensacola Coach Corp.*, 13 So.2d 221 (Fla. 1943): *Martin v. United Security Services, Inc.*, 314 So.2d 765 (Fla. 1975). There can, therefore be no error in regard to the failure to award punitive damages.

CONCLUSION

The final judgment entered in favor of Eastern Air Lines, Inc. should be affirmed.

By: s/_____
KATHLEEN M. O'CONNOR

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of January, 1985, to Daniel Gonzales Gellert, P.O. Box 187, Cocoa Beach, Florida 32931.

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By: s/_____
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